

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's disability, if any?
- (2) Is claimant entitled to unauthorized and future medical benefits?
- (3) Is claimant entitled to future vocational rehabilitation benefits?

At oral argument the attorneys stipulated the average weekly wage, ordered by Special Administrative Law Judge William F. Morrissey, was appropriate and this issue was not further litigated. Claimant's average weekly wage is therefore found to be \$547.38.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) Claimant has proven by a preponderance of the credible evidence that he has sustained a twenty-seven and three-fourths percent (27.75%) permanent partial general disability as a result of the injury sustained on February 4, 1992, while employed by the Kansas Turnpike Authority.

The claimant had been employed by the Kansas Turnpike Authority for six (6) years when on February 4, 1992, while making a U-turn on the turnpike, was involved in an automobile accident, sustaining injuries to his neck and left shoulder. The claimant was off work and was paid temporary total benefits for nine (9) weeks subsequent to the injury. Upon his return to work, claimant was immediately terminated from employment with the respondent, apparently due to the illegal U-turn which led to the original accident.

The claimant was examined and treated by Michael P. Estivo, D.O., and ultimately released to return to work with a lifting restriction of fifty (50) pounds infrequently, meaning one-third of the day, and thirty (30) pounds frequently, meaning two-thirds of the day. Dr. Estivo rated claimant at a four percent (4%) permanent partial impairment to the body as a whole on a functional basis.

At the request of his attorney, claimant was examined by Dr. Ernest Schlachter on January 25, 1993. Dr. Schlachter restricted claimant to thirty (30) pounds maximum lift with the left upper extremity, ten (10) pound maximum lift with the arm outstretched, and rated claimant at five percent (5%) permanent partial impairment to the body as a whole on a functional basis as a result of the impingement syndrome found in the left shoulder.

Claimant was examined by Mr. Jerry Hardin for purpose of evaluating his loss of ability to perform work in the open labor market and to earn a comparable wage. According to Mr. Hardin, after considering both Dr. Schlachter's and Dr. Estivo's restrictions, claimant had suffered a fifteen to twenty percent (15-20%) loss of access to the open labor market. Mr. Hardin further found claimant currently capable of earning \$340.00 per week which, when compared to the average weekly wage of \$547.38, computes to a loss of ability to earn a comparable wage of thirty-eight percent (38%).

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 1992 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

As Dr. Schlachter rated claimant at five percent (5%) permanent partial impairment on a functional basis and Dr. Estivo rated claimant at four percent (4%) permanent partial impairment on a functional basis, the Appeals Board finds claimant has suffered a four and one-half percent (4.5%) permanent partial impairment to the body as a whole on a functional basis as a result of the injury on February 4, 1992.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

While claimant has testified that he feels he has the ability to perform the same work he was doing at the time of the injury and while he is currently seeking employment similar to that done for the respondent, a review of the record indicates claimant was never provided the opportunity by the respondent to engage in any work for wages comparable to the gross average weekly wage that the employee was earning at the time of the injury. Claimant was terminated on his first day back from work and has been unable to obtain work in the interim.

As K.S.A. 44-510e(a) states clearly the employee must engage in work for wages in order to bring into play the presumption of no work disability, the presumption under K.S.A. 44-510e(a) would not apply to the facts in this situation. The burden of proof is upon the claimant to establish his right to an award for compensation by proving all of the various conditions upon his right to it depends. It must be established by preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984). The uncontradicted evidence in this matter consists of the testimony of the claimant, the testimony of Dr. Ernest Schlachter, and the testimony of Mr. Jerry Hardin. All agree claimant suffered an injury arising out of and in the course of his employment which left him functionally less able than prior to the date of injury.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

In determining the extent of permanent partial disability, both the reduction of a claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. The statute is silent as to how this percentage is to be arrived at, and, absent any indication as to how this is to be accomplished, we cannot say that the District Court erred in the method it opted and applied in the instant case. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

Hughes, while indicating that a balance of the two factors is required, does not state specifically how this balance is to occur or what emphasis is to be placed on each of the tests.

In determining legislative intent, the Court is not required to examine only the language of this statute, but may properly "look into the causes which impel the statute's adoption, the objective sought to be attained, the statute's historical background and the effect the statute may have under the various constructions suggested." In re Petition of City of Moran, 238 Kan. 513, 520, 713 P.2d 451 (1986). K.S.A. 1990 Supp. 44-510e(a) requires a balancing of the claimant's ability to perform work in the open labor market and the claimant's ability to earn a comparable wage. These factors must be considered in the light of the claimant's education, training, and capacity for rehabilitation.

The Appeals Board, in reviewing the uncontradicted testimony of both Dr. Schlachter and Dr. Estivo, and the testimony of Mr. Hardin, finds, by combining the seventeen and one-half percent (17.5%) loss of access to the open labor market and thirty-eight percent (38%) loss of ability to earn comparable wage, claimant has suffered a twenty-seven and three-fourths percent (27.75%) permanent partial general disability as a result of the injuries suffered on February 4, 1992.

(2) Claimant is entitled to future medical benefits upon application to and approval by the Director. Claimant is further entitled to unauthorized medical up to \$350.00 upon presentation of an itemized statement.

(3) Claimant is denied vocational rehabilitation benefits as part of this Award. Claimant has testified to his ability to perform the same or similar work to that which he was performing at the time of his injury. While claimant has been off work for more than ninety (90) days per K.S.A. 44-510g(e), it is apparent to the Appeals Board that the claimant does not require vocational rehabilitation services or retraining in order to obtain work similar or identical to that being performed at the time of his original injury.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated January 20, 1994, shall be, and hereby is, affirmed in part and reversed in part in that the claimant, Max J. Johle, is hereby awarded compensation against the respondent, Kansas Turnpike Authority and Liberty Mutual Insurance Co., for nine weeks of temporary total disability compensation at the rate of \$289.00 per week in the sum of \$2,601.00 followed thereafter by 406 weeks permanent partial general body disability at the rate of \$101.27 per week in the sum of \$41,115.62 making a total award of \$43,716.62.

As of May 9, 1994, there is due and owing to claimant nine weeks of temporary total disability compensation at the rate of \$289.00 per week in the sum of \$2,601.00, followed by 108.86 weeks of permanent partial compensation at the rate of \$101.27 per week in the

sum of \$11,024.25 making a total due and owing of \$13,625.25. The remaining 297.14 weeks are to be paid at the rate of \$101.27 per week for a total of \$30,091.37 to be paid until complete or until further order of the Director.

The Appeals Board further finds that claimant is entitled to future medical treatment upon proper application to and approval by the Director and is further granted up to \$350.00 unauthorized medical upon presentation of an itemized statement.

The Appeals Board further finds that claimant's request for vocational rehabilitation benefits is denied.

The claimant's contract of employment with his counsel is hereby approved so far as it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and insurance carrier to be paid as follows:

William F. Morrissey	\$150.00
Special Administrative Law Judge	
Barber & Associates	
Transcript of Preliminary Hearing	\$ 91.70
Deposition of Ernest Schlachter, M.D.	111.20
Deposition of Jerry Hardin	177.50
Transcript of Regular Hearing	57.50
Transcript of Regular Hearing by Deposition	138.50
Total	\$576.40

IT IS SO ORDERED.

Dated this ____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, 1861 N. Rock Road, Suite 320, Wichita, KS 67206
Douglas Johnson, 727 N. Waco, Suite 585, Wichita, KS 67203
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director